

No. 25-13863

**UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

PHILIP MORRIS USA INC., et al.,
Plaintiffs-Appellees,

v.

U.S. FOOD AND DRUG ADMINISTRATION, et al.,
Defendants-Appellants.

On Appeal from the U.S. District Court
for the Southern District of Georgia
(Case No. 24-143 – Judge Lisa G. Wood)

**BRIEF OF WASHINGTON LEGAL FOUNDATION
AS AMICUS CURIAE SUPPORTING
PLAINTIFFS-APPELLEES AND AFFIRMANCE**

Cory L. Andrews
Zac Morgan
Counsel of Record
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302
zmorgan@wlf.org

April 15, 2026

*Counsel for Amicus Curiae
Washington Legal Foundation*

**CERTIFICATE OF INTERESTED PERSONS AND
CORPORATE DISCLOSURE STATEMENT**

Under 11th Cir. R. 26.1-1, Washington Legal Foundation (WLF) certifies that the following persons and entities were omitted from the Certificates filed by the parties:

- (1) Washington Legal Foundation (amicus curiae)
- (2) Zac Morgan (counsel for amicus curiae)
- (3) Cory L. Andrews (counsel for amicus curiae)

Under Fed. R. App. P. 26.1, WLF states that it is a nonprofit, tax-exempt corporation under § 501(c)(3) of the Internal Revenue Code; it has no parent corporation, issues no stock, and no publicly held company enjoys a 10% or greater ownership interest.

Date: April 15, 2026

/s/ Zac Morgan
Zac Morgan
Counsel for Amicus Curiae
Washington Legal Foundation

TABLE OF CONTENTS

Table of Authorities	iii
Identity and Interest of Amicus Curiae.....	1
Statement of the Issues	1
Introduction and Summary of Argument.....	2
Argument	5
I. THE NOTICE-AND-COMMENT FAILURE GOES DIRECTLY TO FIRST AMENDMENT TAILORING	5
II. FDA’S ENTIRE COMPELLED-SPEECH REGIME CAN’T SURVIVE PROPER FIRST AMENDMENT REVIEW.....	7
a. This wouldn’t be a <i>Zauderer</i> case.....	7
b. FDA’s compelled-speech regime is unlikely to survive exacting scrutiny.....	11
Conclusion.....	16
Certificate of Compliance	17
Certificate of Service	18

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Am. Bev. Ass'n v. City & Cnty. of S.F.</i> , 916 F.3d 749 (9th Cir. 2018)	4, 6
<i>Am. Meat Inst. v. U.S. Dep't of Agric.</i> , 760 F.3d 18 (D.C. Cir. 2014)	1, 8, 10
<i>Ams. for Prosperity Found. v. Bonta</i> , 594 U.S. 595 (2021)	3, 11
<i>Bantam Books, Inc. v. Sullivan</i> , 372 U.S. 58 (1963)	3
<i>Campaign Legal Ctr v. Fed. Election Comm'n</i> , 507 F. Supp. 3d 79 (D.D.C. 2020)	16
<i>Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.</i> , 447 U.S. 557 (1980)	3, 4, 6, 9, 11
<i>Fed. Election Comm'n v. Wis. Right to Life, Inc.</i> , 551 U.S. 449 (2007)	9
<i>Ford Motor Credit Co. v. Milhollin</i> , 444 U.S. 555 (1980)	15
<i>Ibanez v. Fla. Dep't of Bus. and Prof. Regul., Bd. of Accountancy</i> , 512 U.S. 136 (1994)	9
<i>In re Primus</i> , 436 U.S. 412 (1978)	9
<i>McCutcheon v. Fed. Election Comm'n</i> , 572 U.S. 185 (2014)	6

<i>Moody v. NetChoice</i> , 603 U.S. 707 (2024)	4, 8
<i>Morse v. Frederick</i> , 551 U.S. 393 (2007)	2
<i>Milavetz, Gallop & Milavetz, P.A.</i> , 559 U.S. 229 (2010)	7
<i>Nat’l Inst. of Fam. and Life Advocates v. Becerra</i> , 585 U.S. 755 (2018)	10
<i>NetChoice v. Moody</i> , 34 F.4th 1196 (11th Cir. 2022).....	4, 8
<i>O’Connor v. Donaldson</i> , 422 U.S. 563 (1975)	8
<i>PDK Labs, Inc. v. U.S. Drug Enforcement Admin.</i> , 362 F.3d 786 (D.C. Cir. 2004)	2
<i>R.J. Reynolds Tobacco Co. v. FDA</i> , 696 F.3d 1205 (D.C. 2012).....	1, 12, 13
<i>R.J. Reynolds Tobacco Co. v. FDA</i> , 96 F.4th 863 (5th Cir. 2024).....	1
<i>R.J. Reynolds Tobacco Co. v. FDA</i> , Case No. 25-40137 (5th Cir. 2026).....	1
<i>United States v. Stevens</i> , 559 U.S. 460 (2010)	7
<i>WLF v. Henney</i> , 56 F. Supp. 2d 81 (D.D.C. 1999)	10
<i>WLF v. Henney</i> , 202 F.3d 331 (D.C. Cir. 2000)	10

<i>Wooley v. Maynard</i> , 430 U.S. 705 (1977)	3, 14
---------------------------------------------------------	-------

<i>Yellowbear v. Lampert</i> , 741 F.3d 48 (10th Cir. 2014)	12
----------------------------------------------------------------------	----

<i>Zauderer v. Off. of Disciplinary Counsel</i> , 471 U.S. 626 (1985)	3, 8, 10
--------------------------------------------------------------------------------	----------

Constitutional Provision

U.S. Const. art. I, § 8	14
-------------------------------	----

U.S. Const., amend. I	2, 5, 6, 7, 8, 9, 10, 13, 14, 15
-----------------------------	----------------------------------

Statutes

5 U.S.C. § 553(b)(3)	5
----------------------------	---

5 U.S.C. § 706(2)	6
-------------------------	---

15 U.S.C. § 1333(a)(1)	2, 5, 11
------------------------------	----------

15 U.S.C. § 1333(c)(1-2)	6
--------------------------------	---

15 U.S.C. § 1333(d)[2]	5
------------------------------	---

21 U.S.C. § 812	13
-----------------------	----

Regulations

21 C.F.R. § 1141.10(a)	2
------------------------------	---

21 C.F.R. § 1141.10(a)(1)(i-ii, x-xi)	5
---------------------------------------------	---

21 C.F.R. § 1141.10(a)(1)(x-xi)	5
---------------------------------------	---

Other Authorities

Omri Ben-Shahar & Carl Schnieder, <i>More Than You Wanted to Know: The Failure of Mandated Disclosure</i> (Kindle Ed. 2014)	3, 15
Comment Ltr. of RAI Services Co., Docket No. FDA-2019-N-3065 (Oct. 11, 2019)	14
Comment Ltr. of RAI Services Co., Ex. C (Stmt. of J. Klick ¶ 5.20), Docket No. FDA-2019-N-3065 (Oct. 11, 2019)	12
FDA, <i>Tobacco Products; Required Warnings for Cigarette Packages and Advertisements</i> , 85 Fed. Reg. 15638 (Mar. 18, 2020)	2, 3, 5, 12, 13
RTI Int'l, <i>Experimental Study of Cigarette Warnings: Study 2 Report</i> (May 2019)	15

IDENTITY AND INTEREST OF AMICUS CURIAE*

Washington Legal Foundation is a nonprofit, public-interest law firm and policy center with supporters nationwide. WLF promotes free enterprise, individual rights, limited government, and the rule of law. As part of that mission, WLF regularly files as amicus curiae to oppose the Food and Drug Administration's (FDA) efforts to unlawfully compel speech. *See, e.g., R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205 (D.C. 2012) (*D.C. Reynolds*), *overruled in part by Am. Meat Inst. v. U.S. Dep't of Agric.*, 760 F.3d 18 (D.C. Cir. 2014) (en banc); *R.J. Reynolds Tobacco Co. v. FDA*, 96 F.4th 863 (5th Cir. 2024); *R.J. Reynolds Tobacco Co. v. FDA*, Case No. 25-40137 (5th Cir. 2026).

STATEMENT OF THE ISSUES

1. Whether FDA violated the Administrative Procedure Act (APA) when it failed to provide raw data about its choice of disclaimers during the notice-and-comment period.
2. Whether vacatur was the appropriate remedy for this failure.

* No party's counsel authored any part of this brief. No one, apart from WLF and its counsel, contributed money intended to fund the brief's preparation or submission. All parties have consented to the filing of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Tobacco Control Act compels speech and—especially how FDA wields it—violates the First Amendment. 15 U.S.C. § 1333(a)(1); 21 C.F.R. § 1141.10(a); FDA, *Tobacco Products; Required Warnings for Cigarette Packages and Advertisements*, 85 Fed. Reg. 15638 (Mar. 18, 2020). The district court set aside FDA’s Final Rule imposing new graphic warnings because the agency violated the APA during the notice-and-comment period. That notice-and-comment failure was fatal, and vacatur was the right remedy. When “it is not necessary to decide more, it is necessary not to decide more.” *Morse v. Frederick*, 551 U.S. 393, 431 (2007) (Breyer, J., concurring in part and dissenting in part) (quoting *PDK Labs, Inc. v. U.S. Drug Enforcement Admin.*, 362 F.3d 786, 799 (D.C. Cir. 2004) (Roberts, J., concurring)).

But that doesn’t mean First Amendment considerations go away. Far from it—reversal could give FDA’s unconstitutional Final Rule the force of law. “The wrong is compounded when the issue, though closely balanced in the minds of sophisticated men, is resolved” one way or the other “against freedom of expression and on the side of censorship.”

Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 73 (1963) (Douglas, J., concurring). Vacatur took the side of freedom of expression in two ways.

First, the raw data FDA failed to disclose revealed that four of the Final Rule’s warnings failed to “promot[e] greater public understanding of the negative health consequences of smoking,” 85 Fed. Reg. at 15639, any more than an old Surgeon General’s warning that FDA itself contends is “effectively ‘invisible.’” *Id.* at 15638. That goes directly to the Constitution’s insistence that disclosure regimes be “narrowly tailored.” *Ams. for Prosperity Found. v. Bonta*, 594 U.S. 595, 608 (2021) (Roberts, C.J., controlling); *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 564 (1980). While we as consumers might have become numb to mandatory disclaimers as ubiquitous features of American commercial life, Omri Ben-Shahar & Carl Schnieder, *More Than You Wanted to Know: The Failure of Mandated Disclosure* (Kindle Ed. 2014), state-sponsored ventriloquism is strongly disfavored under the Constitution. *Wooley v. Maynard*, 430 U.S. 705, 714 (1977).

What about *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985)—the government’s ever-ready justification for when it wants to hijack commercial speech? *Zauderer* is much misunderstood, but even

courts that permissively interpret it insist on proper tailoring. *Am. Bev. Ass'n v. City & Cnty. of S.F.*, 916 F.3d 749, 757 (9th Cir. 2018) (striking down untailored commercial warning label under *Zauderer*). So even if a loose form of *Zauderer* review applied, FDA's own data would compel tossing out four of the Rule's graphic warnings.

And in *this* circuit, the only case straying from *Zauderer*'s original scaffolding has been vacated. *NetChoice v. Moody*, 34 F.4th 1196, 1227 (11th Cir. 2022), *vacated and remanded Moody v. NetChoice*, 603 U.S. 707 (2024). Properly understood, *Zauderer* is no license for the government to affix whatever "factual and uncontroversial" information it wants on a company's pitch or product. *Zauderer* applies only to edge cases where commercial speech could likely be banned as fraudulent. It's no "controversy" to fight the ancient crime of fraud by forcing a commercial speaker to complete a misleading sentence with clarifying facts. But when the government seeks to commandeer a proposed commercial transaction for any other reason, *Zauderer* just doesn't apply. That means FDA's compelled speech regime must be reviewed under exacting scrutiny, which it is unlikely to survive. *Cent. Hudson*, 447 U.S. at 564.

Of course, if this Court concludes that the district court was right to vacate the Rule, it is unlikely a future court will have to go down this path—so the district court’s order is also honoring constitutional avoidance.

ARGUMENT

I. THE NOTICE-AND-COMMENT FAILURE GOES DIRECTLY TO FIRST AMENDMENT TAILORING.

The raw data FDA failed to disclose during notice-and-comment, 5 U.S.C. § 553(b)(3), established that four of FDA’s graphic labels, 21 C.F.R. §§ 1141.10(a)(1)(i-ii, x-xi), failed to “promot[e] greater public understanding of the risks associated with the use of tobacco products,” 85 Fed. Reg. at 15639, more than an old statutory warning FDA itself called “effectively ‘invisible.’” *Id.* at 15638. But “promoting public understanding” is FDA’s own rationale for its graphics. *Id.* at 15639. Not only that, improving “public understanding” is the sole statutory basis for the government to ever “adjust” Congress’s disclaimers. 15 U.S.C. § 1333(d)[2]. Two of the statistically useless graphic labels accompanied disclaimers FDA crafted itself—more “amending” than “adjusting.” *Compare* 15 U.S.C. § 1333(a)(1) *with* 21 C.F.R. § 1141.10(a)(1)(x-xi). But even if FDA’s redlining is an “adjustment”—that adjustment still must

further “greater public understanding”—not simply tread water. Since the law requires the labels to be cycled out over time, 15 U.S.C. § 1333(c)(1-2), this information was of obvious import to commenters. Vacatur was the only remedy to cure such a fatal defect. 5 U.S.C. § 706(2).

Vacatur also advances First Amendment values. The First Amendment requires that compelled disclaimers be “narrowly drawn” and “directly advance” the government’s asserted interest. *Cent. Hudson.*, 447 U.S. at 564–65 (internal quotation marks and citation omitted). A disclaimer that fails to improve public understanding of health risks doesn’t do that. That’s fatal under any constitutional standard.

Zauderer doesn’t apply here, *infra* at 7–11, but even *Zauderer* forbids untailored state action because in every “First Amendment context, fit matters.” *McCutcheon v. Fed. Election Comm’n*, 572 U.S. 185, 218 (2014) (Roberts, C.J., controlling). For example, applying *Zauderer*, the Ninth Circuit rejected a commercial disclaimer that took up 20 percent of an ad, when the government’s own evidence suggested it didn’t need to go beyond 10 percent to get the job done. *Am. Bev. Ass’n*, 916 F.3d

at 757. *Zauderer* is a “less exacting scrutiny,” sure—but it’s not a free pass. *Milavetz, Gallop & Milavetz, P.A.*, 559 U.S. 229, 249 (2010).

The data that FDA declined to share went directly to the regulation’s constitutional fit. On FDA’s own terms, four graphic labels—two based in statute, two wholesale FDA rewrites—cannot survive *any* level of constitutional review. Sending the Rule back for reconsideration safeguarded the First Amendment while vindicating the APA. That constitutionally maximizing decision should be affirmed.

II. FDA’S ENTIRE COMPELLED-SPEECH REGIME CAN’T SURVIVE PROPER FIRST AMENDMENT REVIEW.

Of course, the government is hardly a reliable narrator of “potential constitutional problems.” *United States v. Stevens*, 559 U.S. 460, 480 (2010). Four disclaimers can’t fly on the government’s own terms, but what about the Constitution’s? There the whole regime implodes, which only magnifies the constitutional savings secured below.

a. This wouldn’t be a Zauderer case.

No doubt, FDA would object that this is a *Zauderer* case—and so neither the Act’s disclaimers nor FDA’s rewrites must be subjected to rigorous scrutiny. Not so. The only in-circuit precedent divorcing *Zauderer* from its narrow anti-fraud context—and the only relevant

in-circuit precedent cited by FDA in its papers briefing the First Amendment below (Dkt. 39-1 at 42)—is *Moody*, 34 F.4th at 1227, which itself has been vacated, *Moody*, 603 U.S. at 726, and is no longer good law. *O'Connor v. Donaldson*, 422 U.S. 563, 577 n.12 (1975) (Supreme Court “decision vacating the judgment of the Court of Appeals deprives that court’s opinion of precedential effect”).

That’s fortunate, because this Court’s vacated decision wrongly suggested that *Zauderer* allows the government substantial slack to force companies to “provide [consumers] with helpful information” about their products. *Moody*, 34 F.4th at 1227 (quoting *Zauderer*, 34 F.4th at 651). That’s never been true. Let’s go back to the original case—*Zauderer* “did not appear *ex nihilo*, nor can its analysis be read *in vacuo*.” *Am. Meat Inst.*, 760 F.3d at 38 (Brown, J., dissenting).

Philip Q. Zauderer was lying. Not overtly, but by omission. Zauderer was a lawyer who wanted potential clients to know that he worked on contingency—so clients wouldn’t bear fees if they lost. But Zauderer didn’t inform his audience “that the client may have to bear certain *expenses*”—namely, costs. 471 U.S. at 650 (emphasis supplied). The Supreme Court held that Ohio could compel him to supply that

information. Not because it was factual, but because his original ads courted a species of *fraud*. A lay consumer might consider a “no fees” ad as a pitch for genuinely free-if-you-lose-your-case legal services—then be snookered into signing a pay-costs-no-matter-what contract.

Because his speech was deceptive or fraudulent, Ohio likely could have prohibited Mr. Zauderer’s commercials outright. But out of an abundance of constitutional caution, the Supreme Court decided that a disclaimer requirement worked against unscrupulousness while still letting the man speak. *Fed. Election Comm’n v. Wis. Right to Life, Inc.*, 551 U.S. 449, 474 (2007) (Roberts, C.J., controlling) (“Where the First Amendment is implicated, the tie goes to the speaker, not the censor”). So correcting for Zauderer’s deception with a “narrowly drawn” disclaimer, *Cent. Hudson*, 447 U.S. at 565 (quoting *In re Primus*, 436 U.S. 412, 438 (1978)), was simply a less restrictive means of furthering the government’s ancient interest in clearing fraud from the marketplace. *See Ibanez v. Fla. Dep’t of Bus. and Prof. Regul., Bd. of Accountancy*, 512 U.S. 136, 146 (1994) (*Zauderer* is “an appropriately tailored check against deception or confusion”).

So the *Zauderer* Court’s note that the State could append only “factual and uncontroversial information” to Mr. Zauderer’s speech was a limiting instruction to the government—not an open invitation to compel whatever it likes. 471 U.S. at 651. Ohio could force Mr. Zauderer to disclose that clients would pay costs, if not fees. But the State couldn’t also force him to parrot the government’s broader views. *Nat’l Inst. of Fam. and Life Advocates v. Becerra*, 585 U.S. 755, 768–69 (2018) (“*Zauderer* has no application” where the government goes beyond providing “information about the terms under which [goods or] services will be available”) (quoting *Zauderer*, 471 U.S. at 651) (ellipses omitted); *WLF v. Henney*, 56 F. Supp. 2d 81, 85–86 (D.D.C. 1999) (First Amendment forbids restrictions designed to “balance” a company’s opinion and understanding of its own product), *judgment vacated in part due to lack of Article III controversy*, 202 F.3d 331 (D.C. Cir. 2000).

Where a commercial transaction is misleadingly incomplete *and* only direct government action can finish the thought, *Zauderer* lies. “Conversely, when the government is not curing deception, constitutional protections remain robust and undiminished,” *Am. Meat. Inst.*, 760 F.3d

at 40 (Brown, J., dissenting), and the government’s scripts must survive *Central Hudson*’s exacting scrutiny. 447 U.S. at 564.

The Tobacco Control Act’s disclaimers—both the statutory text and the Final Rule’s rewrites and graphic labels—aren’t aimed at deception or fraud. FDA simply grafts Congress’s anti-smoking message (“WARNING: Smoking can kill you”), 15 U.S.C. § 1333(a)(1), on pro-smoking platforms, such as a pack for sale or cigarette advertising. It would be one thing if those graphics applied only to ads claiming cigarettes were *not* addictive, or did *not* cause cancer, or did *not* harm children, but neither the Act nor the Rule evince any such modesty. The government simply hijacks valuable commercial space for its anti-smoking crusade. This it cannot do.

b. FDA’s compelled-speech regime is unlikely to survive exacting scrutiny.

That does not mean, of course, that the government is precluded from slapping disclaimers on cigarette ads. It just must do the demanding work of proving that its mandate is narrowly tailored to directly advance a substantial interest. *Cent. Hudson*, 447 U.S. at 564; *Ams. for Prosperity Found.*, 594 U.S. at 608 (Roberts, C.J., controlling) (“Regardless of the type of association, compelled disclosure requirements are reviewed

under exacting scrutiny”). And under exacting scrutiny, these warning labels are very likely unconstitutional. *Cf. D.C. Reynolds*, 696 F.3d at 1222.

The Executive Branch has characterized the Act’s mission as “promoting greater public understanding of the negative health consequences of cigarette smoking.” 85 Fed. Reg. at 15639. As an abstract matter, the federal government certainly has a heightened interest in the life and safety of its citizens. But as then-Judge Gorsuch once observed, “[t]he more abstract the level of inquiry, often the better the governmental interest will look.” *Yellowbear v. Lampert*, 741 F.3d 48, 57 (10th Cir. 2014). What about the concrete interest invoked here—improving public understanding that smoking is bad? That’s a different story. The American people are already well-aware of the dangers of smoking. As FDA’s own PATH survey shows, 99.5% of individuals believe that cigarette smoking harms health, with 91% believing that it is “very or extremely harmful.” Comment Ltr. of RAI Services Co., Ex. C (Stmt. of J. Klick ¶ 5.20), Docket No. FDA-2019-N-3065 (Oct. 11, 2019). Can it really be a substantial governmental interest to try to push near-unanimity about the risks of smoking to absolute unanimity?

Nor is it obvious that an unadorned interest in *education* is really at issue. FDA claims that “increased smoking cessation and decreased initiation” are not the government’s aims. 85 Fed. Reg. at 15650. But it strains credulity that Congress wants a better-educated population for a better-educated population’s sake. The statute’s text is clear: Congress wanted Americans not to smoke because smoking kills. *D.C. Reynolds*, 696 F.3d at 1218. And for the sake of argument, let’s spot the government a substantial governmental interest in stamping out smoking. This regime still isn’t a narrowly tailored means of directly advancing that interest.

The Constitution provides many tools for Congress to accomplish such a mission without taking over private speech for public purposes. Congress could always ban outright the sale or use of tobacco, for instance, as it has for other harmful products. *See* 21 U.S.C. § 812 (establishing “schedules of controlled substances”). That would affect no one’s speech rights, since there is no First Amendment right to advertise an illegal transaction. *Pittsburgh Press Co. v. Pittsburgh Comm’n on Hum. Relations*, 413 U.S. 376, 388 (1973). Or Congress could levy significant taxes on tobacco production or consumption, to price

producers and users out of the market. U.S. Const. art. I, § 8. Congress could even prohibit health insurance companies from insuring tobacco users or decline to cover the costs of tobacco-related illnesses through federally funded healthcare programs like Medicare. None of these approaches infringe on the First Amendment “right to refrain from speaking,” *Wooley*, 430 U.S. at 714, and all of them would directly advance Congress’s actual interest in deterring cigarette use.

FDA also failed to seriously consider alternative approaches. It ignored several less-restrictive alternatives suggested by stakeholders—public-education campaigns, differently placed and differently sized warnings, or revised textual warnings. *See* Comment Ltr. of RAI Services Co. at 31–33, Docket No. FDA-2019-N-3065 (Oct. 11, 2019).

No doubt, these alternatives might be politically difficult to accomplish. But hard work for the political branches and federal agencies is no excuse for softening liberty. Besides, Congress’s failure to wrestle with difficult solutions is just another cost of mandatory disclosure. Because disclaimers are assumed to work and are cheap for the government to impose, they “undermine other regulation and ease

pressure on lawmakers to enact better but more controversial regulation. Thus bad law drives out better.” Ben-Shahar & Schnieder 170.

Indeed, FDA has not really shown that any given images-and-text avalanche, even if they honored the statute, would substantially change behavior in the end. *See Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 568 (1980) (“*Meaningful* disclosure does not mean *more* disclosure”) (emphasis in original). FDA’s own study of the effects of many potential graphic warnings, for example, showed that they yielded virtually no long-term statistically significant change in participants’ views about health risks. RTI Int’l, *Experimental Study of Cigarette Warnings: Study 2 Report* (May 2019). “If a disclosure fails in the laboratory, it cannot withstand the tumult of real life.” Ben-Shahar & Schneider 47. And that’s without considering the long-term desensitizing effect that the labels, even graphic ones, will have over time. It’s human nature for people to regularly get used to things that were once jarring.

* * *

Since FDA’s compelled-speech rules aren’t narrowly tailored to a sufficiently vital interest, scrapping the Final Rule directly advanced First Amendment values. Affirmance will provide an opportunity for

FDA to go back and rethink its graphic labels, textual redlining, and listen to (now) fully informed feedback from the regulated community and other stakeholders. It also provides space and time for Congress, “heeding Alexander Pope’s dictum that admitting error simply means that one is wiser today than one was yesterday,” to potentially reconsider whether the unconstitutional Tobacco Control Act should remain on the books at all. *Campaign Legal Ctr v. Fed. Election Comm’n*, 507 F. Supp. 3d 79, 80–81 (D.D.C. 2020).

CONCLUSION

Vacatur was appropriate and prevented the implementation of an unconstitutional regulation. The Court should affirm.

Respectfully submitted,

/s/ Zac Morgan

Cory L. Andrews

Zac Morgan

WASHINGTON LEGAL FOUNDATION

2009 Massachusetts Ave. NW

Washington, DC 20036

(202) 588-0302

Counsel for Amicus Curiae

Washington Legal Foundation

CERTIFICATE OF COMPLIANCE

I certify that:

1. This brief complies with the type-volume limit of Fed. R. App. P. 29(a)(5) because this brief contains exactly 2,978 words, excluding those parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced serif typeface using Microsoft Word in 14-point Century Schoolbook.

Dated: April 15, 2026

/s/ Zac Morgan
Zac Morgan
Counsel for Amicus Curiae
Washington Legal Foundation

CERTIFICATE OF SERVICE

Under Fed. R. App. P. 25(c)(1)(D) and 11th Cir. R. 25-3, I certify that on April 15, 2026, the foregoing amicus curiae brief was filed electronically with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit using the CM/ECF system, which will send notice of such filing to all registered CM/ECF users.

Dated: April 15, 2026

/s/ Zac Morgan
Zac Morgan
Counsel for Amicus Curiae
Washington Legal Foundation